UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RETIREMENT BOARD OF THE POLICEMEN'S ANNUITY AND BENEFIT FUND OF THE CITY OF CHICAGO, *et al.*,

Plaintiffs,

-against-

THE BANK OF NEW YORK MELLON,

Defendant.

11 Civ. 5459 (WHP)

MEMORANDUM & ORDER

WILLIAM H. PAULEY III, District Judge:

Plaintiffs own mortgage-backed securities issued by trusts and indentures for which The Bank of New York Mellon ("BNYM") serves as trustee. In their Second Amended Complaint, Plaintiffs allege four claims: (1) violations of the Trust Indenture Act of 1939 (the "TIA"), (2) breach of contract, (3) breach of the implied covenant of good faith and fair dealing, and (4) breach of fiduciary duty. BNYM moves to dismiss the first three claims. For the following reasons, BNYM's motion to dismiss is granted in part and denied in part.

BACKGROUND

I. Plaintiffs' Allegations

Familiarity with this Court's earlier Memorandum & Order on BNYM's first motion to dismiss is presumed. See Ret. Bd. of the Policemen's Annuity & Benefit Fund of Chi. v. Bank of N.Y. Mellon, 914 F. Supp. 2d 422 (S.D.N.Y. 2012) [hereinafter Ret. Bd. I]. For the purposes of this motion, this Court assumes the allegations in the Second Amended Complaint ("Complaint") to be true.

The structure of mortgage securitization transactions is now familiar: "To raise funds for new mortgages, a mortgage lender sells pools of mortgages into trusts created to receive the stream of interest and principal payments from the mortgage borrowers. The right to receive trust income is parceled into certificates and sold to investors, called certificateholders." Blackrock Fin. Mgmt. Inc. v. Segregated Account of Ambac Assurance Corp., 673 F.3d 169, 173 (2d Cir. 2012).

Plaintiffs hold mortgage-backed securities issued by a Delaware trust under an Indenture for which BNYM serves as trustee. (Second Amended Complaint, ¶ 114, ECF No. 89 [hereinafter "Compl."]; Compl. Ex. D, at Indenture § 2.02, ECF No. 89-10 beginning at 7.) The Delaware trust entered into a Sale and Servicing Agreement ("SSA") with Countrywide Home Loans, Inc. governing the sale of the underlying mortgage loans and the master servicer's responsibilities. (Compl. ¶ 4; Compl. Ex. D, at SSA, ECF No. 89-9.) Countrywide made certain representations and warranties regarding the quality of the mortgages it sold and serviced. (Compl. ¶¶ 4, 6.) But the underlying mortgages were riddled with document deficiencies. (Compl. ¶¶ 9-10.)

The gravamen of the Complaint is that a prudent trustee was obligated to remedy Countrywide's failures by requiring the master servicer to cure or repurchase the defective loans in the trusts. (Compl. ¶¶ 8, 14-16.) Yet BNYM took no action to protect Plaintiffs. As a consequence of the underwriting defects and inadequate servicing, the value of Plaintiffs' mortgage-backed securities plummeted. (Compl. ¶¶ 97-101.)

Plaintiffs also allege that BNYM impaired Plaintiffs' ability to collect on a possible, future judgment from Countrywide or its successor, Bank of America. By 2008, financial and regulatory challenges confounded Countrywide. (Compl. ¶¶ 46-47, 103.) When

Bank of America announced its intention to acquire Countrywide in 2008, it revealed that it would not be assuming Countrywide's liabilities as part of the merger. (Compl. ¶ 102.) In the announcement's wake, BNYM acted to protect certificateholders of certain commercial note trusts by suing Countrywide in Delaware. (Compl. ¶ 103.) Before the merger was effective, BNYM and Countrywide settled that lawsuit ("Delaware Settlement"), (Compl. ¶¶ 103-05,) thereby decreasing the assets available to compensate other certificateholders such as Plaintiffs. (Compl. ¶ 22.)

When Bank of America merged with Countrywide, it acquired most of Countrywide's assets and assumed only select obligations, including the commercial note trusts at issue in the Delaware Settlement. (Compl. ¶ 21.) While BNYM forced Bank of America to assume those obligations as part of the Delaware Settlement, it did nothing to protect Plaintiffs' interests. (Compl. ¶¶ 21-22.)

II. Procedural History

This motion represents BNYM's third effort to dismiss Plaintiffs' TIA claim. On April 3, 2012, this Court ruled that the Trust Indenture Act applied to the New York trusts in addition to the Delaware trust. Ret. Bd. I, 914 F. Supp. 2d at 429. Further, the Amended Complaint alleged a default under the TIA and the Delaware trust's Indenture. Ret. Bd. I, 914 F. Supp. 2d at 431-32. By alleging that Countrywide and Bank of America failed to cure or repurchase the defective mortgages, the Amended Complaint pleaded that the Delaware trust had breached its obligations under the Indenture. Ret. Bd. I, 914 F. Supp. 2d at 432 (citing Indenture § 3.05). Under the Indenture, a breach by the Delaware trust is an event of default. Ret. Bd. I, 914 F. Supp. 2d at 432.

BNYM moved for reconsideration and to certify an interlocutory appeal. This Court denied BNYM's motion for reconsideration but certified the Retirement Board I decision

for interlocutory appeal. Ret. Bd. of the Policemen's Annuity & Benefit Fund of Chi. v. Bank of N.Y. Mellon, No. 11 Civ. 5459 (WHP), 2013 WL 593766, at *5 (S.D.N.Y. Feb. 14, 2013) [hereinafter Ret. Bd. II]. The Court of Appeals granted the parties' petitions for interlocutory appeal. The appeal has been argued and remains sub judice.

In the meantime, Plaintiffs filed the Complaint which is the subject of this motion to dismiss.

III. Discussion

A. Legal Standard

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "[A]lthough a court must accept as true all of the allegations contained in a complaint, that tenet is inapplicable to legal conclusions, and [t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Harris v. Mills, 572 F.3d 66, 72 (2d Cir. 2009) (internal quotation marks omitted) (citation omitted). A court determines "whether the 'well-pleaded factual allegations,' assumed to be true, 'plausibly give rise to an entitlement to relief.'" Hayden v. Paterson, 594 F.3d 150, 161 (2d Cir. 2010) (quoting Iqbal, 556 U.S. at 679).

On a motion to dismiss, courts may consider "facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and . . . matters of which judicial notice may be taken." Allen v. WestPoint–Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991). "[W]here a conclusory allegation in the complaint is contradicted by a document attached to the complaint, the document controls and the allegation is not accepted as true." Amidax Trading Grp. v. S.W.I.F.T. SCRL, 671 F.3d 140, 146-47 (2d Cir. 2011) (citations omitted).

B. Claim for Breach of Implied Covenant of Good Faith and Fair Dealing

i. Whether Plaintiffs' Factual Allegations Are Plausible

"Under New York law, parties to an express contract are bound by an implied duty of good faith." Harris v. Provident Life & Accident Ins. Co., 310 F.3d 73, 80 (2d Cir. 2002) (citation omitted). The implied covenant doctrine holds parties to those implied promises "so interwoven into the contract 'as to be necessary for effectuation of the purposes of the contract,'" to effectuate the parties' intent. Thyroff v. Nationwide Mut. Ins. Co., 460 F.3d 400, 407 (2d Cir. 2006). Plaintiffs allege that certain BNYM acts and omissions breached this duty by failing to protect Plaintiffs' interests and by reducing the assets available to satisfy any judgment against Countrywide. The acts and omissions include failing to act on Countrywide's known breaches, settling the Delaware lawsuit, and facilitating Bank of America's removal of Countrywide's assets to protect other trusts. BNYM argues that the allegations regarding facilitation are implausible and that documents referenced in the Complaint contradict those averments.

In evaluating the plausibility of a claim, a court may take judicial notice of public documents referenced in the pleading and relied on by the plaintiffs in drafting the pleading. See Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002). Contrary to BNYM's assertion, the corporate consents referenced in the Complaint, (see Compl. ¶¶ 21, 106 (referring to Bank of America's and Countrywide's corporate written consents)), do not undermine Plaintiffs' allegations concerning the Delaware Settlement or BNYM's participation in the Bank of America-Countrywide transaction. Those consents acknowledge the need for BNYM as trustee to approve supplemental indentures evidencing Bank of America's assumption of Countrywide's obligations and covenants under select indentures. (Houpt Decl. Ex. 4 at BACMBIA-C0000168525, ECF No. 108-4; Houpt Decl. Ex. 5 at CWMBIA-G0000196816, ECF No. 108-5.) Because the documents are consistent with the allegations of the Complaint, this

Court may proceed "on the assumption that all the [factual] allegations in the complaint are true." See Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 185 (2d Cir. 2012) (alteration in original) (quoting Twombly, 550 U.S. at 555)).

ii. Whether the Implied Covenant Claim Is Redundant

BNYM argues that the implied covenant claim is duplicative of Plaintiffs' breach of contract claim. Under New York law, breach of the implied duty of good faith "is merely a breach of the underlying contract," rather than a distinct cause of action. Provident Life, 310 F.3d at 80. "Typically, 'raising both claims in a single complaint is redundant, and courts confronted with such complaints under New York law regularly dismiss any freestanding claim for breach of the covenant of fair dealing'" where the claims derive from the same set of facts. JPMorgan Chase Bank, N.A. v. IDW Grp., LLC, No. 08 Civ. 9116 (PGG), 2009 WL 321222, at *5 (S.D.N.Y. Feb. 9, 2009) (quoting Jordan v. Verizon Corp., No. 08 Civ. 6414 (GEL), 2008 WL 5209989, at *7 (S.D.N.Y. Dec. 10, 2008)). Both claims allege BNYM failed to exercise its rights under the trust documents to protect Plaintiffs' interests. (Compl. ¶¶ 125, 129.) The implied covenant claim, however, reaches beyond those facts to include BNYM's settlement with Countrywide and BNYM's participation in the Bank of America-Countrywide merger. To the extent Plaintiffs' implied covenant claim rests on these additional facts, it is not duplicative of the breach of contract claim. See Fillmore E. BS Fin. Subsidiary LLC v. Capmark Bank, 552 F. App'x. 13, 16-17 (2d Cir. Jan. 9, 2014) (rejecting district court's reasoning that claim was duplicative and finding claim had an independent factual predicate).

Plaintiffs also argue that their implied covenant claim alleges distinct damages from their breach of contract claim and therefore is freestanding. Through the implied covenant claim, Plaintiffs seek compensation for the value of the judgment they would have received from Countrywide but for the diminution of Countrywide's available assets; their breach of contract

claim seeks to recover the decrease in value of Plaintiffs' certificates caused by BNYM's acts and omissions. (Compl. ¶¶ 118-130.) These are distinct harms. Cf. JPMorgan Chase, 2009 WL 321222, at *5-8 (analyzing each act separately for redundancy). Accordingly, Plaintiffs' breach of the implied covenant claim is confined to a claim based on the Delaware Settlement and BNYM's participation in the Bank of America-Countrywide merger.

Plaintiffs seek to plead the duplicative portion of their breach of implied covenant claim as an alternative to their breach of contract claim. But Plaintiffs misunderstand the relationship among claims based on contract, implied covenant, and quasi-contract. Under New York law, plaintiffs may assert quasi-contract claims in the alternative to breach of contract claims where the existence, scope, or meaning of the contract is in dispute because the two claims represent mutually exclusive remedies. Reilly v. Natwest Markets Grp. Inc., 181 F.3d 253, 263 (2d Cir. 1999). Some courts have permitted alternative pleading of implied covenant claims by analogizing implied covenant claims to quasi-contractual claims. Fantozzi v. Axsys Techs., Inc., No. 07 Civ. 02667 (LMM), 2008 WL 4866054, at *7 (S.D.N.Y. Nov. 6, 2008); see E*Trade Fin. Corp. v. Deutsche Bank AG, No. 05 Civ. 0902, 2008 WL 2428225, at *26 (S.D.N.Y. June 13, 2008).[1] But an implied covenant does not offer an alternate remedy to a contract claim; it is embedded in every contract, Thyroff, 460 F.3d at 407, and inherent in every breach of contract claim, see, e.g., ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d 208, 228-29 (2011) (holding plaintiffs pleaded viable breach of contract claim based on implied covenant). Thus an implied covenant claim is not distinct from a concurrently pled breach of contract claim unless it is based on different factual allegations. JPMorgan Chase, 2009 WL 321222, at *5; cf.

[1] Plaintiffs' remaining cases are distinguishable. See, e.g., Hard Rock Cafe Int'l, (USA), Inc. v. Hard Rock Hotel Holdings, LLC, 808 F. Supp. 2d 552, 567-68 (S.D.N.Y. 2011) (finding claim not duplicative where plaintiff made additional factual allegations beyond claim for breach of contract and no possibility of double recovery).

Cruz v. FXDirectDealer, LLC, 720 F.3d 115, 125 (2d Cir. 2013) (holding district court properly dismissed implied covenant claim as redundant).

iii. Whether the Complaint Alleges a Violation of an Implied Promise

Next, BNYM argues the Complaint does not plead that BNYM purposefully violated a duty implied by the agreements. Beyond express obligations, a promisor must perform "any promises which a reasonable person in the position of the promisee would be justified in understanding were included [in the contract]." Dalton v. Educ. Testing Serv., 87 N.Y.2d 384, 389 (1995) (quoting Rowe v. Great Atl. & Pac. Tea Co., 46 N.Y.2d 62, 69 (1978)). "This embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" Dalton, 87 N.Y.2d at 389 (quoting Kirke La Shelle Co. v. Paul Armstrong Co., 263 N.Y. 79, 87 (1933)); see also Thyroff, 460 F.3d at 407. But the implied covenant "cannot be construed so broadly as effectively to nullify other express terms of a contract, or to create independent contractual rights." Fillmore E., 552 F. App'x. at 16 (quoting Consol. Edison, Inc. v. Ne. Utils., 426 F.3d 524, 529 (2d Cir. 2005)); see also Dalton, 87 N.Y.2d at 389.

Courts presume an implied promise if it "is so interwoven into the contract 'as to be necessary for effectuation of the purposes of the contract.'" Thyroff, 460 F.3d at 407 (quoting Galesi, 904 F.2d at 136). An implied covenant claim survives a motion to dismiss where the implied promise protects either the contract's central purpose or a party's right under a specific contractual provision. See, e.g., JPMorgan Chase Bank, 2009 WL 321222, at *6-7 (finding contract to recruit talent for specific group implicitly bound defendant to disclose that competitor had hired it to recruit the head of that group); Wieder v. Skala, 80 N.Y.2d 628, 635-36 (1992) (holding claim survived motion to dismiss under CPLR 3211 because conduct within the ethical

standards of the legal profession was "fundamental" and "essential" component of associate's employment contract).

As to the surviving implied covenant claims, the Complaint alleges BNYM implicitly promised to preserve Plaintiffs' ability to collect on any future judgment against Countrywide. But Plaintiffs' ability to collect on some future judgment is not a benefit or a fundamental purpose of these agreements. Nor is it an essential component necessary to effectuate these contracts. "[T]he implied covenant does not extend so far as to undermine a party's 'general right to act on its own interests in a way that may incidentally lessen' the other party's anticipated fruits from the contract." M/A-COM Sec. Corp. v. Galesi, 904 F.2d 134, 136 (2d Cir. 1990) (per curiam) (quoting Van Valkenburgh, Nooger & Neville v. Hayden Publ'g Co., 30 N.Y.2d 34, 46 (1972)). Read most liberally, Plaintiffs seek merely to curtail BNYM's right to act in its own best interests. That is insufficient.

iv. Whether the Implied Covenant Claim Sounds in Tort or Fiduciary Law

Finally, Plaintiffs contend their implied covenant claim alleges violations of Defendants' obligations under fiduciary and tort law, and therefore should survive. But New York law does not recognize a tort for breach of an implied covenant. See Provident Life, 310 F.3d at 81 (comparing New York and California law); Batas v. Prudential Ins. Co. Am., 724 N.Y.S.2d 3, 7-8 (App. Div. 1st Dep't 2001) (rejecting proposed claim for tortious breach of the implied covenant as a "brand new cause of action"). And Plaintiffs cite no authority incorporating a tort or fiduciary standard of care into an implied covenant claim. See, e.g., Sommer v. Fed. Signal Corp., 79 N.Y.2d 540, 550-53 (1992) ("[M]erely alleging that the breach of a contract duty arose from a lack of due care will not transform a simple breach of contract into a tort."); ABN AMRO Bank, 17 N.Y.3d at 228-29 (holding implied covenant claim survived motion to dismiss under CPLR 3211 where complaint alleged defendant purposefully acted to

injure plaintiff's right to receive the contract's fruit); Ambac Assurance Corp. v. DLJ Mortg. Capital, Inc., 31 Misc.3d 1208(A), 2011 WL 1348375, at *12 (N.Y. Sup. Ct. Apr. 7, 2011) (finding implied covenant claim survived motion to dismiss where defendant frustrated plaintiff's right to the contract's fruits), rev'd on other grounds on reconsideration, 33 Misc.3d 1208(A), 2011 WL 4861862 (N.Y. Sup. Ct. Oct. 7, 2011), rev'd on other grounds, 956 N.Y.S.2d 891 (App. Div. 1st Dep't 2013);[2] cf. EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11, 22-23 (2005) (holding that plaintiff's fiduciary claim survived a motion to dismiss while dismissing its implied covenant claim).

C. Event of Default under the Indenture

For the third time, BNYM contends the Complaint fails to allege the occurrence of an "event of default" under the TIA and the Indenture. But the Complaint is based on the same Indenture as the earlier pleading.[3] Because this Court's first ruling on BNYM's argument is on appeal, this Court lacks jurisdiction over the issue. See Ret. Bd. of the Policemen's Annuity & Benefit Fund of Chi. v. Bank of N.Y. Mellon, 297 F.R.D. 218, 221 (S.D.N.Y. Sept. 11, 2013) [hereinafter Ret. Bd. III]. Accordingly, this branch of BNYM's motion is denied. See Fed. R. Civ. P. 62.1(a)(2).

D. Notice to BNYM of the Event of Default

Finally, BNYM contends the TIA and breach of contract claims with respect to the Delaware trust should be dismissed because there is no allegation that BNYM "knew" of the

[2] Ambac Assurance found that an implied covenant claim may support punitive damages, but that does not suggest that the implied covenant claim incorporated tort obligations. See Rocanova v. Equitable Life Assurance Soc'y of U.S., 83 N.Y.2d 603, 613 (1994) (punitive damages available for breach of contract where conduct associated with breach is egregious tortious conduct aimed at the public generally). Therefore, Plaintiffs' claim for breach of the implied covenant is dismissed.

[3] Compare Compl. Ex. D, Indenture, ECF No. 89-10 (CWHEQ Revolving Home Equity Loan Trust, Series 2006-D), with Decl. Matthew D. Ingber, Ex. A, Dec. 16, 2011, ECF No. 20 at 4 (same).

Delaware trust's default as that term is defined by the Indenture. The Indenture Trustee may be charged with knowledge of an event of default if it received "actual knowledge" or "notice" of the event of default.[4] (Indenture § 6.01(c).) Plaintiffs need only plead allegations that plausibly give rise to an inference of notice. See Hayden, 594 F.3d at 161; Policemen's Annuity & Benefit Fund of Chi. v. Bank of Am., NA, 943 F. Supp. 2d 428, 442-43 (S.D.N.Y. 2013). The Complaint contains detailed allegations that BNYM knew of Countrywide's violations from notices of default, communications from insurers, repurchase requests, letters from Fannie Mae, and national news reporting. (Compl. ¶¶ 81-96.) This is sufficient to plead notice.

[4] Section 6.01(c) of the Indenture states in relevant part:

> The Indenture Trustee may not be relieved from liability for its own negligent action, its own negligent failure to act, or its own willful misconduct, except that: . . . (iv) the Indenture Trustee shall not be charged with knowledge of the occurrence of an Incipient Default . . . unless a Responsible Officer at the Corporate Trust Office obtains actual knowledge of the failure or the Indenture Trustee receives notice of the failure . . . .

Indenture § 6.01(c). An Incipient Default refers to "any occurrence that is, or with notice or lapse of time or both would become, an Event of Default." Compl., Ex. D, Indenture, Master Glossary of Defined Terms, at ECF No. 89-12 at 24.

CONCLUSION

For the foregoing reasons, The Bank of New York Mellon's motion to dismiss the first, second, and third causes of action is granted in part and denied in part. Specifically, the motion to dismiss the third cause of action for breach of the implied covenant of good faith and fair dealing is granted and the motion to dismiss the Trust Indenture Act and breach of contract claims is denied. The Clerk of Court is directed to terminate the motion pending at ECF No. 107.

Dated: July 30, 2014
New York, New York

SO ORDERED:

WILLIAM H. PAULEY III
U.S.D.J

All Counsel of Record